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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application by New York Telephone)
Company (d/b/a Bell Atlantic -)
New York), Bell Atlantic)
Communications, Inc., NYNEX Long)
Distance Company, and Bell Atlantic)
Global Networks, Inc., for)
Authorization To Provide In-Region,)
InterLATA Services in New York)

Docket No. 99-295

RHYTHMS NETCONNECTIONS INC.
COMMENTS IN OPPOSITION

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SUMMARY OF ARGUMENT

The longstanding goal of this Commission, embraced by the Telecom Act of 1996, has been to open *all* telecommunications markets—not only traditional voice circuit-switched services, but also advanced data services—to vigorous competition. Perhaps the most compelling success of the 1996 Act is the influx of competitive service providers, like Rhythms, offering customers innovative advanced data communications services. Only when consumers also have easy and real choice of providers for advanced data services can this Commission conclude that BA-NY has irreversibly opened its market to competition.

Rhythms has no wish to stand in BA-NY's path toward provision of long distance; indeed, Rhythms is not in the "long distance business" and therefore has no competitive interest either way in BA-NY's entry into that business. Rhythms' interest is solely in seeing that the benefits of open telecom markets—and in particular the singular promise of advanced data services—become a reality for all New York consumers. But reaching that goal does not rest solely in the power of Rhythms, its data competitors, or with other CLEC's seeking to offer other telecommunications services to business and residential customers. The power rests with BA-NY, which will decide whether to honor all of its promises and commitments, and with this Commission, which must exercise its power to require BA-NY to demonstrate not only its commitment, but that it has achieved—and sustained—its obligations. Unfortunately, to date, in the data arena BA-NY has produced mostly promises and not performance.

Rhythms requires very few things from the incumbent, BA-NY, in order to bring a substantially broader panoply of services to customers. Each item Rhythms requires is explicitly denominated in the Section 271 competitive checklist. In determining whether to grant long distance authority, the Commission must conclude that the BOC meets the requirements of the

fourteen point “competitive checklist” set forth in Section 271(c)(2)(B), *and* that the authorization “is consistent with the public interest, convenience and necessity.”

BA-NY’s initial Section 271 application was filed with the New York Public Service Commission (“NY PSC”) on February 13, 1997, before Rhythms was even formed. Notably absent from the debate in the initial phases of the case was *any* discussion of advanced data services. Despite the passage of time, the Commission must regrettably conclude that BA-NY has failed to show it has taken the steps necessary to open *all* markets in New York to effective competition, and in particular the data services market that has shown the most promise of bringing the benefits of competition to consumers.

In considering the state of this record, and whether BA-NY has met its § 271 obligation to open its markets fully and irreversibly to competition, the Commission has repeatedly stressed that the burden of proof rests with the ILEC. That burden simply has not been met by BA-NY. BA-NY has failed to provide the unbundled copper loops and corresponding loop make up data to allow for provisioning DSL services in an efficient, nondiscriminatory, reasonable, and expeditious manner that would permit scalable entry of data competitors into the New York market. Instead, BA-NY’s performance has been plagued with problems, intransigence, and a general slow-roll that has enabled BA-NY to successfully delay data services competition until BA-NY was able to roll out its own limited DSL offering. The unfortunate result of these delaying tactics has been that New York consumers today have fewer choices, but face higher costs, for data services, and have less flexibility than they otherwise would have. Such a result does not comport with the letter of section 271, the public interest or Congressional or Commission intent.

The paucity of data on BA-NY's performance for advanced services, while not surprising given its largely poor performance, must ultimately doom its application. As this Commission has repeatedly held, the market-opening provisions of the Telecommunications Act are *not* targeted solely at voice competition. BA-NY's plague of provisioning problems surrounding collocation, transport and loops for DSL services frustrate and delay competitive roll-out of DSL services. Rhythms views BA-NY's staunch refusal to provide data CLECs with real-time electronic access to its databases containing crucial loop make-up data as the single most immutable obstacle to scaleable entry by competitors providing advanced services in New York.

It has long been said that the past is prologue to the future. Unfortunately, the past has not been encouraging about BA-NY's intention, desire or ability to open its markets to real and effective competition. That history, as exemplified by the treatment experienced by Rhythms and others to date, that must guide this Commission in determining whether and how BA-NY has met its statutory obligations to data CLECs.

Thus, the Commission cannot conclude that BA-NY has met its statutory checklist obligations under Section 271(c) of the Telecommunications Act unless and until BA-NY demonstrates that it is providing nondiscriminatory access to unbundled loops to all voice and data CLECs. Because BA-NY is clearly not providing data CLECs with such access, the Commission must reject BA-NY's 271 application. A similar conclusion is mandated pursuant to the Commission's public interest inquiry. Accordingly, even if the Commission concludes that BA-NY has satisfied the checklist by virtue of its performance with respect to *voice* CLECs, it must nonetheless conclude that BA-NY fails to meet the checklist because of its performance for data CLECs.

If, however, the Commission proceeds in approval of BA-NY's application on the basis of its performance for *voice* services only, as Rhythms believes it cannot, the public interest demands that at a minimum, the Commission condition such approval to ensure that BA-NY fully opens its local market to competition by data CLECs. Specifically, the Commission should order, as the Pennsylvania Commission did, that BA-NY must provide data CLECs with real-time, electronic access to its databases containing loop make-up information. In addition, the Commission should order BA-NY to immediately fill data CLEC requests for clean copper loops of any length at rates, terms and conditions that do not restrict the services the CLEC can provide over that loop.

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RHYTHMS NETCONNECTIONS INC.
COMMENTS IN OPPOSITION

Rhythms NetConnections Inc., in conjunction with Rhythms Links Inc. (formerly ACI Corp.) (collectively "Rhythms"), files these comments in accordance with the Public Notice issued on September 29, 1999¹ by the Federal Communications Commission ("Commission" or "FCC") on the application of New York Telephone Company, d/b/a Bell Atlantic - New York, ("BA-NY") et al. in the above-referenced proceeding.²

Rhythms participated in the state proceedings considering BA-NY's compliance with the competitive checklist. Rhythms is a nationwide provider of high-performance, high-speed data services, primarily utilizing Digital Subscriber Line ("DSL") technology for high-speed local access to and from the end user's desktop. Geis-Williams Aff. ¶ 16. Rhythms provides data

¹ Comments Requested on Application by Bell Atlantic for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, DA 99-2014, Public Notice (Sept. 29, 1999).

² *Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York* (filed Sept. 29, 1999) ("Application").

networking solutions at a reasonable cost to consumers in New York and nationwide.³ Rhythms does not focus solely on the Internet Service Provider market, but instead provides a full range of service and broad market coverage, including suburban areas where competition has not yet been established.⁴

INTRODUCTION

The longstanding goal of this Commission, embraced by the Telecom Act of 1996, has been to open all telecommunications markets—not only traditional voice circuit-switched services, but also advanced data services—to vigorous competition. Only when consumers also have easy and real choice of providers for advanced data services can this Commission conclude that BA-NY has irreversibly opened its market to competition. Rhythms has no wish to stand in BA-NY's path toward provision of long distance; indeed, Rhythms is not in the "long distance business" and therefore has no competitive interest either way in BA-NY's entry into that business. Rhythms' interest is solely in seeing that the benefits of open telecom markets—and in particular the singular promise of advanced data services—become a reality for all New York consumers. Rhythms wants to provide that choice for consumers not only in the downtown

³ The data services offered by Rhythms are included in the category of "advanced services", which the Commission has defined as "high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report & Order & Further Notice of Proposed Rulemaking, CC Docket 98-147 at n.2 (rel. March 31, 1999) ("*Advanced Services Order*").

⁴ *Geis-Williams Aff.* ¶ 16. The Commission has recognized that digital subscriber line technologies make it possible for ordinary citizens to access various networks, such as the Internet, corporate networks, and governmental networks, at high speeds through existing copper telephone lines, and that existing infrastructure is being used "in new ways that make available to average citizens a variety of new services and vast improvements to existing services." *Advanced Services Order* ¶ 5. The FCC concluded that "the ability of Americans to access these high-speed, packet-switched networks will likely spur our growth and development as a nation." *Id.*

neighborhoods of LATA 132, but throughout New York to Albany, Troy, Schenectady, Buffalo and Rochester by the end of next year.⁵

But reaching that goal does not rest solely in the power of Rhythms, its data competitors, or with other CLEC's seeking to offer other telecommunications services to business and residential customers. The power rests with BA-NY, which will decide whether to honor all of its promises and commitments, and with this Commission, which must exercise its power to require BA-NY to demonstrate not only its commitment, but that it has achieved—and sustained—its obligations. Unfortunately, to date, what has been produced has been largely promises and not performance. It has long been said that the past is prologue to the future. Unfortunately, the past has not been encouraging about BA-NY's intention, desire or ability to open its markets to real and effective competition. That history, as exemplified by the treatment experienced by Rhythms and others to date, that must guide this Commission in determining whether BA-NY will ultimately succeed in obtaining approval under Section 271.

Under Section 271 of the Telecommunications Act of 1996,⁶ the Bell Operating Companies ("BOCs"), including BA-NY, are specifically prohibited from offering interLATA services until an application is approved, on a state by state basis, by the FCC. In determining whether to grant long distance authority, the Commission must conclude that the BOC meets the requirements of the fourteen point "competitive checklist" set forth in Section 271(c)(2)(B), *and* that the authorization "is consistent with the public interest, convenience and necessity."⁷

⁵ Vol. 58, Tab 887, Tr. 3832.

⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("1996 Act" or "Act").

⁷ 47 U.S.C. § 271(d)(3).

BA-NY's initial Section 271 application was filed with the New York Public Service Commission ("NY PSC") on February 13, 1997, before Rhythms was even formed. Since that date, BA-NY has made numerous other filings, and submitted a "Pre-Filing Statement" to the NY PSC, all in an effort to prove its compliance with the market opening requirements of Sections 251 and 271. Notably absent from the majority of BA-NY's filings in the initial phases of the case was *any* discussion of advanced data services. Similarly, there was little if any mention of advanced services in the first two Technical Conferences before the NY PSC (held in April, 1997 and December, 1997), where BA-NY tried—but failed—to demonstrate its entitlement to § 271 authority. A third attempt was made by BA-NY during Technical Conferences in 1999, held on June 7-10; June 14-15; and July 27-29. Based on the record developed in these state proceedings, BA-NY filed its application with the Commission on September 29, 1999. However, as described below, BA-NY has failed to show it has taken the steps necessary to open *all* markets in New York to effective competition, and in particular the data services market that has shown the most promise of bringing the benefits of competition to consumers.

In considering the state of this record, and whether BA-NY has met its § 271 obligations, the Commission has repeatedly stressed that the burden of proof rests with the ILEC.⁸ That burden simply has not been met by BA-NY. Regrettably, as the record in this proceeding demonstrates, BA-NY has failed to provide the unbundled copper loops for provisioning DSL services, collocation, and unbundled transport needed by Rhythms in an efficient,

⁸ See, e.g., Application of BST Corp., BST Telecommunications, Inc. and BST Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion & Order, FCC 98-271, ¶ 51 (Oct. 13, 1998); Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion & Order, FCC 97-298 ¶¶ 14-15 (Aug. 19, 1999).

nondiscriminatory, reasonable, and expeditious manner that would permit scalable entry of data competitors into the New York market. Instead, BA-NY's performance has been plagued with problems, intransigence, and a general slow-roll that has enabled BA-NY to successfully delay data services competition until BA-NY was able to roll out its own limited DSL offering. Further, it is clear that BA-NY favors its own retail offerings over those of its competitors.⁹ The unfortunate result of these delaying tactics has been that New York consumers today have fewer choices, but face higher costs, for data services, and have less flexibility than they otherwise would have. Such a result does not comport with the letter of section 271, the public interest or Congressional or Commission intent.

Rhythms' provisioning of DSL services competes directly with BA-NY's DSL services, including its recently rolled-out InfoSpeed DSL retail offering¹⁰ and much higher-priced T-1 offerings.¹¹ Because BA-NY's services compete directly with the DSL services offered by Rhythms and other "data CLECs," BA-NY has an incentive to deliberately impede rapid, full scale deployment of DSL by its competitors. Unfortunately, the consequences of that incentive are that New York consumers may lose out on the substantial benefits of competitive high speed data offerings of Rhythms and others.

To provide DSL service, Rhythms, and other "data CLECs", are dependent upon ILECs for three primary components, each of which must be provided under the "Competitive Checklist" of § 271(c)(2)(B). First, Rhythms must lease "clean" copper loops that are not

⁹ Not only has the loop qualification database developed by BA been designed specifically for use by its retail InfoSpeed DSL operation, *see* Section II(B) *infra*, but the process for determining whether a loop will be provided for provision of DSL services favors its T1 services.

¹⁰ BA-NY's service is intended primarily for Internet access, where ISDN speeds are sufficient to upload and download information from the Internet. However, the speeds available through BA-NY's service are considerably slower than those that DSL is capable of providing. *See* Geis-Williams Aff. ¶ 19.

encumbered by any equipment, such as load coils or repeaters, that would interfere with digital signals.¹² Second, Rhythms must collocate equipment at ILEC premises where the copper facilities terminate.¹³ Third, Rhythms often requires unbundled transport facilities, linking Rhythms' metro service centers to Rhythms' collocation arrangements in LEC central offices.¹⁴ Each of these three elements must be obtained on just and reasonable terms; on a reliable and technically acceptable basis; in a expeditious manner that allows Rhythms to respond to the needs of its customers; and without discrimination or prejudice by BA-NY.

BA-NY's paltry showing on the record with respect to checklist compliance for data services, while not surprising given its limited and dismal performance, must ultimately doom its application. As this Commission has repeatedly held, the market-opening provisions of the Telecommunications Act are *not* targeted solely at voice competition. Rather, the Commission has expressly noted that the provisions of the 1996 Act "are technology-neutral and thus apply equally to advanced services and to circuit-switched voice services"¹⁵ and concluded that ILECs are subject to the interconnection obligations of Section 251 with respect to both circuit-switched and packet-switched networks, and that the facilities and equipment used by ILECs to provide advanced services are network elements and generally subject to the obligations in Section 251(c)(3). While the plague of provisioning problems surrounding collocation, transport and loops for DSL services frustrate and delay competitive roll-out of DSL services unnecessarily

¹¹ For many years most ILECs—and BA-NY—have provisioned 1.544 Mbps "T-1" services using High bit rate DSL (HDSL) technology. Vol. 58, Tab 887, Tr. 3730-31; BA-NY Response to ACI Data Request II-6.

¹² Geis-Williams Aff. ¶¶ 17 and 45.

¹³ Geis-Williams Aff. ¶ 17; *see also* Vol. 62, Tab 957, ACI Br. at 12-16; Vol. 45, Tab 689, Affidavit of Paul Bannwart, ACI ¶¶ 3-14; Vol. 49, Tab 759, Supp. Aff. of Paul Bannwart, ACI ¶¶ 2-8.

¹⁴ Geis-Williams Aff. ¶ 17; *see also* Vol. 62, Tab 957, ACI Br. at 17-19; Vol. 45, Tab 689, Bannwart Aff. ¶¶ 15-19.

¹⁵ *Advanced Services Order* ¶ 15.

and raise serious issues of discrimination, Rhythms views BA-NY's staunch refusal to provide data CLECs with real-time electronic access to its databases containing crucial loop make-up data as the single most immutable obstacle to scaleable entry by competitors providing advanced services in New York.

DISCUSSION

I. BA-NY'S FAILURE TO FULLY COMPLY WITH THE COMPETITIVE CHECKLIST IS DELAYING RAPID DEVELOPMENT OF COMPETITION IN ADVANCED SERVICES

As poor as Rhythms finds BA-NY's provisioning of collocation¹⁶ and transport¹⁷ to be, in Rhythms' view the largest failure to comply with the requirements of sections 251, 252 and thereby the competitive checklist in 271(c)(2)(B) and the public interest relates to BA-NY's unbundled loop obligations. Thus, despite the fact that BA-NY's provisioning of collocation remains spotty, slow and unreliable, ultimately Rhythms obtains collocation from BA-NY. While more troubling, BA-NY's failure to provide unbundled transport consistent with its obligations under section 251 and 252 likewise pales in comparison with the roadblocks BA-NY has erected in obtaining unbundled loops. There is no question that BA-NY's failure to provision unbundled clean copper loops of any length on reasonable terms and conditions

¹⁶ Under section 271(c)(2)(B)(i), BA-NY must demonstrate that it provides timely, properly provisioned collocation on reasonable terms and conditions that meet the FCC's requirements. To facilitate the development of competition in the advanced services market, the FCC strengthened the collocation rules "to reduce the costs and delays faced by competitors that seek to collocate equipment in an incumbent LEC's central office." *Id.* ¶ 6. Critically, the FCC's rules are minimum standards, designed to further the development and deployment of advanced services. *Id.* ¶ 23. Yet in key respects, BA-NY's implementation of the Commission's rules fall far short of achieving this objective. *See, e.g.*, Vol. 62, Tab 957, ACI Br. at 12-16; Vol. 62, Tab 949, Covad Br. at 15-20.

¹⁷ Under the competitive checklist BA-NY must provide: "[n]on-discriminatory access to network elements in accordance with the requirements of Section 251(c)(3) and Section 252(d)(1)", including specifically "[l]ocal transport from the trunk side of a wire line local exchange carrier switch unbundled from switching or other services." 47 U.S.C. §§ 271(c)(2)(B)(ii), (v). BA-NY has failed to provide nondiscriminatory unbundled transport in compliance with these obligations, through outright refusal to provide transport as a UNE, poor and protracted provisioning and discrimination in favor of its retail services. *See* Vol. 62, Tab 957, ACI Br. at 17-19; *see also* Vol. 61, Tab 944, NorthPoint Br. at 6-8.

coupled with its outright refusal to provide necessary loop make-up information presents a serious impediment to providers of advanced data services. Allowing BA-NY to persist in imposing such barriers on data CLECs does not comport with a finding that BA-NY has fulfilled the competitive checklist with regard to data providers and cannot withstand scrutiny under a public interest inquiry.

BA-NY must provide loops for carriers providing data services, including DSL, under checklist items (ii) and (iv).¹⁸ Indeed, this Commission has made clear since its August 1996 Local Competition Order¹⁹ that ILECs must provision unbundled loops for carriers providing DSL services, and that accordingly ILECs must “take affirmative steps to condition existing loop facilities,”²⁰ including “‘conditioned’ loops capable of transmitting high-speed digital signals.”²¹ Most recently, in the Commission voted to reaffirm that ILECs must provide “loops, including loops used to provide high-capacity and advanced telecommunications services.”²² Rhythms and other CLECs have requested that BA-NY do just this, and yet it took almost three years for BA-NY to comply with this mandate and provision an ADSL loop to a competitor.²³ Thus, while BA-NY would have this Commission conclude that it is struggling to figure out how to meet

¹⁸ 47 U.S.C. §§ 271(c)(2)(B)(ii), (iv).

¹⁹ *Implementation of the Local Competition Provisions of the 1996 Act*, First Report and Order, 11 FCC Rcd. ¶¶ 377-80 (1996) (“*Local Competition Order*”).

²⁰ *Id.* ¶¶ 377-80.

²¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, ¶ 32 (Aug. 7, 1998) (“*Advanced Services MO&O*”).

²² *FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements*, New Release at 1 (Sept. 13, 1999) (Reporting on action of the Commission by Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98) (“*UNE Remand News Release*”). The actual text of the Commission’s Order is expected at any time.

²³ Vol. 59, Tab 894, BA-NY Response to ACI On the Record Request 13.

these “new” obligations,²⁴ it has been aware the requirement for three years and has yet to figure out how to successfully and fully comply with it.

Indeed, the record demonstrates that Bell Atlantic’s provisioning of unbundled loops raises serious impediments to competitive provision of advanced data services.²⁵ Not only is it apparent that BA-NY delayed and frustrated its competitors’ full scale deployment of DSL services in New York until its own DSL offering was launched,²⁶ but BA-NY practices and policies continue to be designed to limit CLEC deployment of advanced data services that differ significantly from BA-NY’s own offerings.²⁷ BA-NY’s record in this proceeding reveals serious provisioning delays and the failure to provide clean copper loops, including particularly the long loops that will enable customers to obtain services from CLECs where BA-NY is refusing to offer service.

In an effort to mask its deplorable performance with respect to DSL loops, BA-NY has strategically failed to provide relevant data to this Commission on its loop provisioning for DSL, claiming merely that such “complex and special” loop orders are provisioned at the same interval as their own ADSL services.²⁸ There is presently no metric to measuring BA-NY’s performance

²⁴ See, e.g., *Application* at 19.

²⁵ As Rhythms noted in its state Brief, among other provisioning problems, BA-NY routinely misses its Firm Order Commitment dates, fails to attend scheduled installation and will not migrate a customer “as is”. Vol. 62, Tab 957, ACI Br. at 4-7. Moreover, the plague of ordering and provisioning problems experienced with BA-NY are unprecedented in experience with other CLECs. Vol 58, Tab 887, Tr. 3829-30.

²⁶ It is particularly telling, that although Rhythms had orders pending since early April, BA-NY *first* provisioned a DSL loop to a data CLEC at the end of May as it was rolling out its own DSL offering. Vol. 62, Tab 957, ACI Br. at 7 (*citing* Vol. 59, Tab 894, BA-NY Response to ACI On the Record Request 13). While BA-NY ramped up its own offering, some Rhythms orders placed in April were still languishing at the close of the formal proceedings at the end of July. *Id.*

²⁷ See Geis-Williams Aff. ¶¶ 46-47.

²⁸ Application at 20; Loucoute-Troy Decl. ¶ 82. Notably, provisioning the loop to a data CLEC is not the same as provisioning the service, and thus BA-NY’s attempt at demonstrating parity is elusive. See *id.* Furthermore, the truck roll or “dispatch” BA-NY requires for CLEC DSL loops is a direct consequence of its refusal to provide line sharing to data CLECs and is in no manner “remarkable” as BA-NY claims. *Id.* Rather, it is BA-

in provisioning DSL capable loops, nor was such performance within the scope of the KPMG evaluation.²⁹ Accordingly, BA-NY cannot credibly refute the substantial evidence presented by data CLECs regarding serious provisioning problems and delays in obtaining unbundled local loops for advanced services, including DSL.³⁰

For example, BA-NY refuses to provide certain loops to carriers, particularly long loops and clean loops on reasonable terms and conditions. Any DSL provider, including BA-NY, must have plain copper loops to provision DSL services. Indeed, as Rhythms has repeatedly stated, when it comes to loops, the plainer the loop, the better.³¹ Even though clean loops are a necessary predicate to provisioning DSL services, BA-NY's systems routinely reject orders for loops over 18,000 feet as "not qualified" because those loops could contain load coils, bridged tap or other devices that would interfere with provision of DSL services over the loop.³² Until recently, however, BA-NY would not agree to provide these loops. As Rhythms' Affiants Geis and Williams note, this refusal effectively gates a competitive provider of DSL's service deployment. Geis-Williams Aff. ¶ 61. It is also directly contrary to the obligations under the Act and this Commission's finding that "incumbent LECs must 'take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities'" including, for example, "a loop free of loading coils, bridged taps,

NY's line sharing policy that creates the delay necessitated by the requirement that every competitive DSL provider must order a second line.

²⁹ Vol. 58, Tab 887, Tr 3671-73, 3693-94.

³⁰ See, e.g., Vol. 62, Tab 957, ACI Br. at 4-7; Vol. 62, Tab 949, Covad Br. at 11-14; Vol. 61, Tab 944, NorthPoint Br. at 2-4.

³¹ Loops designed to BellCore specifications are plain up to 18,000 feet. Over 18,000 feet some loops may have interfering devices. See, e.g. Geis-Williams Aff. Exhibit "EHG-RW-8" ("xDSL Impairing Devices").

³² See Geis-Williams Aff. ¶ 61.

and other electronic impediments.”³³ Unless and until BA-NY provides carriers with clean loops of any length on reasonable terms and conditions, it cannot claim it has met its checklist obligations to data CLECs or that its provisioning of unbundled loops meets the public interest.

Recognizing that this Commission will insist it meet its obligation to provide “long loops” to its competitors, BA-NY recently introduced its tariff for Digital Designed Loops.³⁴ What BA-NY fails to disclose, however, is that the nonrecurring charges associated with loop conditioning do not comport with TELRIC. Geis-Williams Aff. ¶¶ 14, 52-54, and Exhibit EHG-RW-5 (Murray Affidavit). Instead of ensuring competitor access consistent with the Commission’s rules, BA-NY has used the tariff as a platform to leverage its anticompetitive policies in a manner that could result in limiting the ultimate deployment of data services in New York. Geis-Williams Aff. ¶¶ 14, 46-47, and 53. For instance, BA-NY’s description of DSL availability indicates that it is severely limiting the ability of data CLECs—such as Rhythms—to deploy DSL technologies over unbundled loops. Specifically, while BA-NY claims it “provides unbundled loops that are designed specifically to provide DSL services,”³⁵ its DDL Tariff limits both the loops that may be used to provide DSL services (“the analog two-wire link should not be used in the provision of ADSL or HDSL Services”³⁶) and the technologies that may be provided over its DSL unbundled loop offering. *See* Geis-Williams Aff. ¶¶ 14 and 46-55.

Such tariff provisions do not, as BA-NY suggests “facilitate” competitors ability to obtain clean loops,³⁷ but decidedly contravene this Commission’s orders. In the *Advanced*

³³ *Advanced Services Order* ¶ 53.

³⁴ *Application* at 20; Loucuture-Troy Decl. ¶ 83.

³⁵ *Application* at 22.

³⁶ Geis-Williams Aff., ¶ 46, DDL Tariff at § 5.5.1.1(A)(1)(b).

³⁷ Lacouture-Troy Decl. ¶ 83.

Services Order, the Commission specifically held that “any technology which has been successfully deployed by any carrier without significantly degrading the performance of other services . . . is presumed acceptable for deployment.”³⁸ Further, the FCC declared that “incumbent LECs should not unilaterally determine what technologies LECs, both competitive LECs and incumbent LECs, may deploy.”³⁹ Although the Commission has made clear that CLECs should not be constrained to deploy only those services the underlying ILEC has chosen to provide, this is precisely what BA-NY’s tariff provides.⁴⁰ Accordingly, the Commission cannot find that BA-NY’s DDL offering provides persuasive evidence of its checklist compliance, or that these offerings satisfy the public interest.

Also troubling is BA-NY’s refusal to abide by this Commission’s ruling regarding spectrum management. In the *Advanced Services Order*, the Commission renounced the practice of ILEC-specific spectrum management rules that “vary from provider to provider and from state to state, thereby requiring competitive LECs to conform to different specification in each areas,” in favor of “uniform spectrum management procedures.”⁴¹ Despite this express holding, BA-NY insists that it can and should impose unilateral spectrum management rules that favor its existing services.

Yet of all these myriad problems, access to crucial loop data in BA-NY’s databases represents the most significant long-term competitive impediment posed by BA-NY’s offering of

³⁸ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket 98-147 ¶ 67 (rel. March 31, 1999) (“*Advanced Services Order*”).

³⁹ *Id.* ¶ 63.

⁴⁰ *Local Competition Order* ¶ 292.

⁴¹ *Advanced Services Order* ¶ 71. Accordingly, this Commission expressly recognized that standards should be set on a national basis, via industry consensus and not by individual ILECs, *id.* ¶ 63, as it was “persuaded by the record that allowing incumbent LECs such authority may well stifle deployment of innovative competitive LEC technology.” *Id.*

unbundled local loops. As the Pennsylvania Commission recently held, Bell Atlantic “must not be permitted to gate CLEC entry into Pennsylvania through a refusal to provide efficient access to crucial loop data. If it does, . . . consumers will be denied broadband capabilities that are already being provided to customers in other jurisdictions.”⁴² Accordingly, the necessity for and failure to provide this loop data is a primary focus of Rhythms’ comments.

II. IN ORDER TO EFFICIENTLY PROVISION DSL SERVICES THAT MAXIMIZE CUSTOMER FUNCTIONALITY, CARRIERS MUST HAVE NONDISCRIMINATORY ELECTRONIC ACCESS TO CRUCIAL LOOP DATA

A. In Order to Efficiently Provision DSL services that Maximize Customer Functionality, Carriers Must Have Nondiscriminatory Electronic Access to Crucial Loop Data

As data CLECs reiterated in the state proceeding, in order to effectively provide New York consumers with maximum functionality for advanced data services, certain crucial data regarding loops is necessary at the preordering stage. This Commission has recognized the essential nature of this information by specifically requiring ILECs to “disclose to requesting carriers information with respect to the number of loops using advanced services technology within the binder and the type of technologies deployed on those loops.”⁴³ Most recently, the Commission has determined that ILEC, including BA-NY must unbundle “access to all loop qualification information contained in any of the incumbent LEC’s databases or other records

⁴² *Joint Petition of Nextlink Pennsylvania, Inc.; Senator Vincent J. Fumo; Senator Roger Madigan; Senator Mary Jo White; the City of Philadelphia; The Pennsylvania Cable & Telecommunications Association; RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion Telecommunications, Inc.; ATX Telecommunications; CTSI, Inc.; MCI Worldcom; and AT&T Communications of Pennsylvania, Inc. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Pennsylvania Public Utility Commission Docket No. P-00991648, and *Joint Petition of Bell Atlantic Pennsylvania, Inc., Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings*, Pennsylvania Public Utility Commission Docket No. P-00991649, Opinion and Order at 117 (Sept. 30, 1999) (“PA Order”).

⁴³ *Advanced Services Order* ¶ 73. This finding builds on the requirement to provide competing carriers with the information necessary to accurately formulate customer orders, including “access to the information such systems contain.” Local Competition Order ¶ 518; Advanced Services MO&O n.103.

need for the provision of advanced services.”⁴⁴ From the inception of its dealings with BA-NY, including from the initial sessions to negotiate an interconnection agreement, Rhythms has repeatedly stressed the need for real-time electronic access to certain crucial loop data. Geis-Williams Aff. ¶ 36. In the DSL collaborative as well as in their pleadings and testimony, other data CLECs have echoed this need.⁴⁵ Yet BA-NY does not and will not provide such access. Geis-Williams Aff. ¶ 36.

Specifically, carriers need access to loop make-up information, including the loops capable of serving an end user, the precise loop length without bridged taps, wire gauge and gauge changes, the location and length of bridged taps, the presence and number of load coils, whether the loops are served behind DLC or over DAMLs, and whether there are repeaters on the loop. *E.g.*, Geis-Williams Aff. ¶¶ 13 and 29. Yet, BA-NY refuses to provide CLECs with the data necessary to efficiently provision services to their customers, instead insisting that CLECs divine what they can from the limited data it provides in the loop qualification database it has specifically developed for its own limited retail DSL offering. Geis-Williams Aff. ¶ 27.

Because CLECs have little to no information about the loops serving, or available to serve, a particular end user, they are hamstrung in their ability to place a loop order that will enable them to rapidly provide the greatest functionality to the end user. This data is crucial, because unlike BA-NY:

We deploy our services using many different varieties of DSL. We use RADSL, we ADSL; we use IDSL. All of these forms of DSL have different operating characteris-

⁴⁴ UNE Remand News Release at 5.

⁴⁵ Geis-Williams Aff. ¶ 36; *see also* Vol. 62, Tab 957, ACI Br. at 8-10; Vol. 62, Tab 949, Covad Br. at 9-10; Vol. 62, Tab 946, MCI WorldCom Br. at 17-18; Vol. 61, Tab 944, NorthPoint Br. at 4-5.

tics; in other words, some work better on lengths under 18,000 feet; others work better on lengths over 18,000 feet and one even works through a digital loop carrier.⁴⁶

Thus, an essential predicate to any finding that BA-NY has met its checklist obligation for unbundled loops is the conclusion that data CLECs have access to crucial information about the loops they seek to lease. At a minimum, the Commission must insist that BA-NY efficiently provide CLECs with such data to meet the public interest test.

The Commission has specifically required ILECs to “disclose to requesting carriers information with respect to the number of loops using advanced services technology within the binder and the type of technologies deployed on those loops.”⁴⁷ This requirement builds on the earlier FCC requirement to provide competing carriers with the information necessary to formulate an accurate order for a customer, including “access to the information such systems contain.”⁴⁸ Therefore, the Commission must insist that BA-NY demonstrate it provides real-time, electronic access to databases containing loop make-up information in order to find that BA-NY has met its 271 burden. To ensure this result, the public interest requires that the Commission must mandate that BA-NY provide such access immediately. Further, until BA-NY has a mechanized system in place, BA-NY should provide manual access to loop makeup information at the same cost as if Rhythms performed a database dip.

B. The Loop Qualification Database Developed By BA-NY For Its Retail Offerings Is Wholly Inadequate For CLEC Provisioning of Advanced Services

In its post-Telecom Act order, this Commission has repeatedly emphasized that “incumbent LECs must ‘take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities’” including, for

⁴⁶ Vol. 58, Tab 887, Tr. 3820; *see also* Geis-Williams Aff. ¶¶ 20 and 24-25.

⁴⁷ *Advanced Services Order* ¶ 73.

example, “a loop free of loading coils, bridged taps, and other electronic impediments.”⁴⁹

Building on these findings, the Pennsylvania Commission recently held that the information BA proposes to provide in its loop qualification database—which is identical to the information proposed for New York—“is insufficient because this database was developed to support the specific needs of BA-PA’s more limited ADSL retail offering and does not include crucial loop information needed for other xDSL services.”⁵⁰

By designing its loop qualification database to service its limited DSL retail offering, BA-NY created a database that is relatively unhelpful to data CLECs that seek to provide a broader array of services to an expanded cross-section of New York customers than does BA-NY. The record is clear that the present “loop qualification” database being developed by BA-NY is wholly deficient for carriers seeking to provide services other than those provided by the incumbent.⁵¹ For example, BA-NY does not report loop length information for loops that are longer than 18,000 feet.⁵² Even in those COs that have qualification information provided, the database does not include information for every loop in the CO on wire gauge, bridged taps, repeaters, load coils, DLC, DAMLs, or data on other loops that could serve the customer.⁵³

⁴⁸ *Local Competition Order* ¶ 518; *Advanced Services MO&O* ¶ 56 n.103.

⁴⁹ *Advanced Services Order* ¶ 53.

⁵⁰ PA Order at 113-114.

⁵¹ Citing Rhythms’ witness Geis, the Pennsylvania Commission accurately observed that “it does [Rhythms] no good to know if a loop is qualified for BA-PA’s retail services. [Rhythms] offers a much more comprehensive slate of services for which [Rhythms] needs specific data about the loop.” PA Order at 114.

⁵² Vol. 58, Tab 887, Tr. 3716; Vol. 60a, Tab 904, BA-NY Response to ACI On the Record Request 14. As the PA Order emphasizes, “the database will be of little value to CLECs because it will not provide precise information on the total length of loops that are the subject of CLEC xDSL provider inquiries, and will provide responses only on the metallic length of the loop” PA Order. at 116-17.

⁵³ Vol. 58, Tab 887, Tr. 3720-23. To exacerbate this problem, BA-NY proposes to exact in every instance a princely sum for this data of either \$0.61 per month per loop (loop qualification) or \$62.03 (manual loop qualification) without any demonstration of the cost basis or nondiscriminatory nature of this charge. Geis-Williams Aff. ¶¶ 31-34; Vol. 58, Tab 887, Tr. 3713-14. BA-NY will not provide a loop without such “loop qualification” such that the charges will apply every month to every loop ordered by a data CLEC. Vol. 58, Tab 887, Tr. 3711.

The Pennsylvania Public Utility Commission recently reviewed — and rejected as discriminatory and inadequate — essentially the same Bell Atlantic mechanized loop qualification database proposal. The Pennsylvania Commission concluded that BA-NY’s loop qualification database is designed to meet the needs of the company’s retail DSL offerings and does not provide the data that new entrants will need. Specifically, the Pennsylvania Commission found that:

BA-PA Witness Stern testified that BA-PA has developed a loop qualification database that stores loop information necessary for provisioning its retail DSL services. *The Commission is persuaded, however, that the availability, structure, utilization, and associated charges of this database are unacceptable.*⁵⁴

The Pennsylvania Commission went on to explain the specific inadequacies in the proposed BA-PA mechanized loop qualification database, which mirrors the database proposed in New York.

For instance, the development of this database is a “multi-year project,” not all of BA-PA’s Central Offices are in the database, and most importantly, “not all types of information requested are in the database at this time.” Indeed, Stern admitted that this database is essentially structured with loop qualification information that will be of primary value to the provision of BA-PA’s own retail ADSL services.

As a result, the database will be of little value to CLECs⁵⁵

Accordingly, the Commission must conclude that BA-NY’s proposed mechanized loop qualification database offered by BA-NY fails to comport with the Commission’s orders and BA-NY’s statutory obligations.

In stark contrast to the deficiencies of BA-NY’s so-called “loop qualification database,” it is clear that the information on loop make up does or should reside in BA-NY’s existing

⁵⁴ PA Order at 116 (emphasis added; footnote omitted). Note that witness Stern is one of the panel of witnesses BA-NY has presented in support of its DDL tariff before the New York Commission.

⁵⁵ *Id.* (footnotes omitted).

LFACS or TIRKS databases.⁵⁶ At the New York technical conference, BA-NY witness White confirmed that as additional loop information is obtained to provision their retail services—including ADSL, HDSL DS-1, 56 Kbps or frame relay DDS—it will be entered into these preexisting LFACS or TIRKS databases, so BA-NY “won’t have to do it twice”.⁵⁷ Consequently, there is no justifiable reason for BA-NY to refuse to provide CLECs with access to these existing databases for a nominal dip charge in order to gain the data necessary to efficiently provision DSL services. Nor is there any CLEC-based need for a wholly separate, extremely costly and insufficiently comprehensive database, such as BA-NY’s loop qualification database. Unfortunately, while BA-NY also testified that its engineers could query LFACS for specific loop information,⁵⁸ in the collaborative, BA-NY has confirmed that CLECs will only be able to obtain this information through a “full engineering work order” that will be provided over a three business day interval.⁵⁹

CLECs seek access to these underlying databases so they can like BA-NY ascertain the loop characteristics necessary to efficiently provision their DSL services.

If we had information on the UNE loop makeup prior to placing the order, we could place an order for the right UNE at the first order submission. If we knew, for example, that the customer was behind a DLC we would order UNE loop for a DLC.

We would then not get an order rejection, causing us to call to find out what the issue is specifically no facilities; we would then not need to resubmit an order, get a pos-

⁵⁶ This finding is consistent with the practice of other ILECs that maintain loop make up information in LFACS. As the Pennsylvania Public Utility Commission concluded when reviewing the same databases for Pennsylvania, “what is patently clear is that the loop database BA-PA is developing for its retail service is built from these underlying databases.” PA Order at 115-116; Vol. 62, Tab 957, ACI Brief at 8.

⁵⁷ Vol. 58, Tab 887, Tr. 3728-31; BA-NY Response to ACI Date Requests II-3, II-6. Indeed, these databases are queried by BA-NY technicians to populate the specialized loop qualification database BA-NY designed to support its retail offering. *Id.*; see also PA Order at 115-16.

⁵⁸ Vol. 58, Tab 887, Tr. 3731-32

⁵⁹ Geis-Williams Aff. ¶ 40; see also Vol. 58, Tab 887, Tr. 3726.

sible rejection for an incorrect SBN and the customer would get their order—much simpler, much less work involved for all of us.

In fact, we believe that the majority of these no facility orders could be completed eliminated preventing tremendous amounts of work on us and Bell Atlantic if we knew the line/make [up] characteristics before we placed the order, and we believe that this type of information already exists; in fact we heard from Mr. White that the majority of it does exist already in LFACs or TIRKS. We want access to that.⁶⁰

NorthPoint, Covad and MCI all echoed this need.⁶¹ Instead, CLECs must submit an order, wait until it is rejected, chase down the basis for the rejection, resubmit the order and hope that they will not have to repeat the whole cumbersome process again. Consistent with its position in the UNE Remand proceeding, this Commission should order the same relief that the Pennsylvania Commission has directed Bell Atlantic to provide in that state:

To ensure that DSL carriers have efficient access to the crucial loop information required for DSL services, BA-PA shall immediately provide CLECs with access to any and all existing databases that contain the material loop information. Further, until BA-PA has a mechanized system in place, it must provide manual access to the loop makeup information as close to a real-time basis as possible, by phone, fax, or other means.⁶²

C. Real-Time Electronic Access Is Essential To Robust Competitive Provision Of DSL Services

As Rhythms' Affiants Geis and Williams attest, "[t]ime is of the essence in providing pre-ordering information, because the market for high-speed data services, in particular DSL-based services, is growing larger and more competitive every day." Geis-Williams Aff. at 42. Accordingly, "the ability to verify loop make-up and complete the order while the customer is still on the line obviously has a significant sales impact." Geis-Williams Aff. ¶ 41. For these reasons, the Pennsylvania Commission properly observed that

⁶⁰ Vol. 58, Tab 887, Tr. 3830-31.

⁶¹ E.g., Vol. 58, Tab 887, Tr. 3795-97, 3798-99, 3823.

⁶² PA Order at 117 (footnote omitted).

Real-time electronic access to loop make-up information is important for several reasons. First, such electronic access will allow CLECs to determine quickly whether a customer's loop is suitable for DSL in response to customer inquiries. Second, electronic access allows CLECs greater flexibility in structuring their work force, because on-line systems could be used 24-hours per day to research the suitability of customer loops to support DSL. Third, electronic systems can support much greater volumes of inquiries than will manual systems. Finally, ILECs may have internal electronic pre-ordering and ordering systems available, thereby giving them an advantage in serving customers over CLECs.⁶³

Accordingly, the Pennsylvania Commission ordered that "BA-PA must provide real-time access to its loop makeup information on an electronic, fully-automated basis. This access can most easily be accomplished by providing CLECs with access to existing electronic databases that contain the relevant data, such as LFACs."⁶⁴

Providing CLECs with access to the loop information in these existing databases would allow both CLECs and BA-NY to avoid the significant delay involved when CLECs' have to submit repeated orders to obtain an appropriate loop to serve an end user, and should significantly streamline the ordering process and enable CLECs to more easily scale their business. The striking fact here is that despite the unanimous requests by data CLECs for access to this crucial data, BA-NY has refused to provide CLECs such access and instead claims either that it has no obligation to provide the data or that the requested information is—in BA-NY's opinion—unnecessary. This does not bode well for enabling competition in New York, or across the region.

⁶³ *Id.* at 114-15.

⁶⁴ *Id.* at 115.

D. BA-NY's Refusal To Provide Loops And Crucial Loop Information Results In Decreased Choice And Higher Costs For New York Consumers Seeking Advanced Data Services

BA-NY's refusal to timely and efficiently provision loops to data CLECs providing DSL services has denied New York consumers the ability to readily access the advanced data services that are the hallmark of competition under the 1996 Act. As Rhythms witness Geis observed:

[T]he power and the full potential of DSL is now just being discovered. Although most of the news that you and I see or hear about today relates to fast Internet access, . . . that's just the tip of the iceberg. The true power of DSL technology is to transmit multiple channels simultaneously. We recently announced the second successful demonstration of a single pair of copper wires in New York City employing DSL to simultaneously transmit 16 voice channels and a data channel, over one pair of copper wires. Think of that. One pair replacing as many as 17 traditional voice lines. DSL is truly advanced communications and Rhythms is a major force in bringing those services to New York.⁶⁵

The evidence in this proceeding clearly demonstrates that BA-NY's provisioning of DSL capable loops to CLECs such as Rhythms prevents scalable entry into the New York market. Frustratingly slow provisioning of DSL loops coupled with BA-NY's refusal to provide long loops over 18,000 feet on reasonable prices, terms and conditions limits the CLECs' ability to serve a significant proportion of New York customers, the very customers BA-NY has determined it will *not* serve.

BA-NY's retail DSL offering, only recently introduced in New York, is quite limited. Geis-Williams Aff. ¶ 19. BA-NY will only provide ADSL service and will not serve customers with long loops, or whose loops are not perfectly suited to support its limited DSL offering. Thus, for many New York consumers, CLECs represent their only ability to obtain advanced data services. The lack of preordering loop data, the cumbersome ordering processes

⁶⁵ Vol. 58, Tab 887, Tr. 3831.

and the serious provisioning problems prevent CLECs from scaling their entry into New York and precludes New Yorkers from obtaining the significant benefits of DSL services.

CONCLUSION

Thus, the Commission cannot conclude that BA-NY has met its statutory checklist obligations under Section 271(c) of the Telecommunications Act unless and until BA-NY demonstrates that it is providing nondiscriminatory access to unbundled loops to all voice and data CLECs. Because BA-NY is clearly not providing data CLECs with such access, the Commission must reject BA-NY's 271 application. A similar conclusion is mandated pursuant to the Commission's public interest inquiry. Accordingly, even if the Commission concludes that BA-NY has satisfied the checklist by virtue of its performance with respect to *voice* CLECs, it must nonetheless conclude that BA-NY fails to meet the checklist because of its performance for data CLECs.

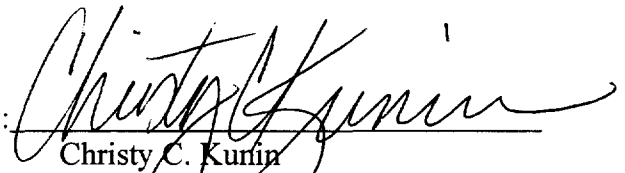
If, however, the Commission proceeds in approval of BA-NY's application on the basis of its performance for *voice* services only, as Rhythms believes it cannot, the public interest demands that at a minimum, the Commission condition such approval to ensure that BA-NY fully opens its local market to competition by data CLECs. Specifically, the Commission should order, as the Pennsylvania Commission did, that BA-NY must provide data CLECs with real-time, electronic access to its databases containing loop make-up information. In addition, the Commission should order BA-NY to immediately fill data CLEC requests for clean copper loops of any length at rates, terms and conditions that do not restrict the services the CLEC can provide over that loop.

Respectfully submitted

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